

NOT FOR PUBLICATION

CLOSED

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

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GERGELY BALLA,

Plaintiff,

v.

VORTEX t/a VORTEX RACING,

Defendant.

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CIVIL ACTION NO. 10-104 (JLL)

**OPINION**

**LINARES**, District Judge.

This matter comes before the Court on Defendant Vortex t/a Vortex Racing's ("Defendant") motion to dismiss Plaintiff's complaint for failure to provide discovery and abide by the Court's Order of July 27, 2010. Plaintiff did not file opposition papers.

**I. Background**

The Court will set forth only the facts relevant to the instant motion. On July 21, 2010, Defendant moved to compel discovery. (D.E. 4). On July 27, 2010, Magistrate Judge Cecchi administratively terminated the motion to compel and ordered Plaintiff to respond to all outstanding discovery demands within ten (10) days. (D.E. 5). To date, Plaintiff has not responded to said demands.

On August 3, 2010, Plaintiff's counsel – Daniel N. Epstein, Esq. ("Mr. Epstein") – moved to withdraw as attorney. (D.E. 6). On November 5, 2010, Defendant moved to dismiss Plaintiff's complaint. On November 29, 2010, the undersigned administratively terminated Defendant's motion to dismiss pending Magistrate Judge Cecchi's ruling on Mr. Epstein's

motion to withdraw as attorney. (D.E. 8). On February 9, 2011, Magistrate Judge Cecchi granted Mr. Epstein's motion to withdraw and directed Plaintiff to retain new counsel within thirty (30) days or proceed on a *pro se* basis. (D.E. 10). To date, Plaintiff has neither represented to the Court that he has retained counsel, nor has an attorney entered an appearance of counsel on his behalf.

On March 22, 2011, Plaintiff filed the instant motion to dismiss Plaintiff's complaint for failure to provide discovery.

## **II. Discussion**

This Court undoubtedly has the power to dismiss a complaint on its own motion or on the motion of an opposing party. Complaints may be dismissed by courts as part of their power to control and manage dockets or as a sanction. Eash v. Riggins Trucking Inc., 757 F.2d 557, 568-69 (3d Cir. 1986). Dismissal may be appropriate where a complaint facially violates a bar to suit, violates a court order, or where a plaintiff fails to prosecute the case. Ray v. Kertes, 285 F.3d 287, 293 n.5 (3d Cir. 2002) (facial bars); Guyer v. Beard, 907 F.2d 1424, 1429 (3d Cir. 1990) (court orders); Eash, 757 F.2d at 560 (discussing dismissal for failure to prosecute in global analysis of inherent power). There are, however, limits to a district court's inherent power, such as the requirements of due process and the borders of judicial authority. In re Tutu Wells Contamination Lit., 120 F.3d 368, 379, 382-84 (3d Cir. 1997), overruled on other grounds, Comuso v. Nat. R.R. Passenger Corp., 267 F.3d 331, 338-39 (3d Cir. 2001).

The Third Circuit applies the test developed in Poulis v. State Farm Fire and Casualty Co. to the dismissal of claims pursuant to the inherent sanction power of the district courts. 747 F.2d 863 (3d Cir. 1984). Poulis requires a district court to balance six factors in determining whether

dismissal is appropriate:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and to respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

747 F.2d at 868 (emphasis in original). This test applies, generally, to any exercise of the sanction power of a district court depriving a party of the right to proceed with or defend a claim. Comdyne I, Inc. v. Corbin, 908 F.2d 1142, 1148 (3d Cir. 1990). Not all of these factors need be satisfied for the court to dismiss a claim or complaint. Ware v. Rodale Press, Inc., 322 F.3d 218, 221 (3d Cir. 2002).

First, Plaintiff chose to proceed *pro se* and, therefore, bears sole responsibility for the prosecution of his claims and compliance with the rules of discovery and this Court's orders. Second, Defendant has been denied the opportunity to develop a substantive defense as the direct result of Plaintiff's refusal to participate in the discovery process and comply with this Court's orders. Third, based on the facts of the this case, Plaintiff has demonstrated a wilfulness to violate the rules of discovery and this Court's orders. On or about February 12, 2010, Defendant served Plaintiff with initial interrogatories and requests for production of documents. (Hurwitz Decl., ¶ 1). On February 16, 2010, Defendant served a second set of interrogatories. (Id. at ¶ 2). By order dated July 27, 2010, Magistrate Judge Cecchi ordered Plaintiff to respond to all outstanding discovery demands within ten (10) days of the entry of said order. (D.E. 5). To date Plaintiff has not provided the discovery requested. Therefore, Plaintiff is in violation of Magistrate Judge Cecchi's order. Thus, based on Plaintiff's apparent decision not to comply

with a Court order, this Court finds that Plaintiff has engaged in willful conduct to violate this Court's order.

In sum, Plaintiff has been afforded ample opportunity to conform with the rules and orders of this Court, yet has failed to do so. Therefore, this Court finds that when applying the Poulis test to the facts of this case, even given Plaintiff's *pro se* status, dismissal of Plaintiff's complaint is warranted.

#### **IV. Conclusion**

For the reasons set forth above, Plaintiff's motion to dismiss is **GRANTED**. An appropriate order accompanies this opinion.

Dated: May 6, 2011

/s/ Jose L. Linares  
United States District Judge